**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

In the matter of

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| 2002 Biennial Review – | ) | |
| Review of the FCC's Broadcast | ) | |
| Ownership Rules, and other rules | ) | MB Docket 02-277 |
| Pursuant to Section 202 of the | ) | (Consolidating MM Dockets |
| Telecommunications Act of 1996 | ) | 01-235, 01-317, 00-244) |

In Reply to the comments of
The National Association of Broadcasters

To: The Commission

# Reply Comments of Thomas Desmond On Notice of Proposed Rulemaking

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## Executive Summary:

With a couple of exceptions (newspaper/television and some television duopolies), media ownership rules should not be further relaxed, and in fact should be tightened in certain regards. Further relaxation will generally hurt diversity, result in increased commercial loads, and otherwise harm the public interest.

As a result, I must respectfully disagree with portions of the comments filed by the NAB, which call for a substantial additional ownership deregulation.

## Reply to the comments filed by the National Association of Broadcasters

### Increase in number of media outlets available hasn't meant increased choices for the public

The NAB uses the increase in media outlets available to viewers and listeners to justify the elimination of several of the FCC's current ownership limits.

While it is true that the number of television channels and radio stations available to the typical viewer and listener have increased dramatically over the years, I would question that the diversity available to the consumer has increased anywhere near as significantly. Instead, I would submit that the viewer and listener are actually confronted with the mere *illusion* of increased choice – a large number of programming options controlled by a small, oligopolistic group of large corporations, and fed to them through (in most instances) a monopolistic pipeline controlled by a single company.

The NAB notes that cable television, DBS, and other multi-channel providers have increased the number of video programming services available – but neglects to note that this reflects a pipeline of programming controlled by a single provider. If the viewer should be dissatisfied with the programming offered by one of the multi-channel providers, they essentially have four options: their local cable system, DirecTV, DISH Network, or foregoing a multi-channel provider and relying upon off-air reception. For those who choose the last option, broadcast ownership regulation becomes vitally important, since they will not have access to any of the additional video programming services offered by the multi-channel providers.

Those who choose to stick with a multi-channel provider are essentially given three choices – not dissimilar to the three choices (between their local ABC, CBS, and NBC affiliates) that most viewers were given 40 years ago. And for the viewer of a multi-channel provider, broadcast ownership rules remain vitally important as well, since "must-carry" means that the local broadcasters are the only choices available from their multi-channel provider that are not dictated by that provider.

The NAB provides figures that show that the number of full-powered broadcast television stations in the US has not quite doubled in the last 27 years (from 952 in 1975 up to 1,714 last November). The NAB fails to note that one group was limited to 7 television stations in 1975, and is allowed an unlimited number (within the 35% national cap – 70% if the stations are all in the UHF band) today. To keep parity with the diversity of ownership present in 1975, an appropriate limit today would be a 12 station national limit.

A look at the radio numbers is also quite revealing. Again, these numbers have not quite doubled in the past 27 years (from 7,785 in 1975 up to 13,296 in November, 2002). Meanwhile, we have gone from a regulatory environment where the largest groups could own no more than 14 stations nationally to unlimited ownership, where the largest group (Clear Channel) owns well over 1,000 radio stations. Ownership diversity has indeed been lessened by ownership deregulation over the past decades. The debate that remains is whether this has hurt the listeners.

The contention that almost half of all radio stations remain as locally owned duopolies or stand-alones doesn't accurately reflect the marketplace, either. It neglects to consider that the stations that are owned by the large groups are typically the high-powered AM and FM stations that can cover a full market, whereas the stand-alones are lower powered AM stations or FM rimshots with partial market coverage in most cases. Considering a suburban Class A FM 50 miles from the main city of a market as real competition for a Class C FM with a transmitter in the heart of a metropolitan area is a joke. The stations that can actually compete in the marketplace are in the hands of far fewer companies than was the case prior to deregulation, and pointing to an independently owned station that covers a fraction of the metropolitan area will not change that fact.

Another point of disagreement is over the contention that an increased number of available formats on radio stations in a given market necessarily translate into increased choices for the public. This is subjective and not easily given to numerical analysis. It can also come down to a debate over semantics – for example, if a market has both a “Hot AC” outlet and a “Modern AC” outlet, does this really represent two distinct listening choices for the average listener? Someone who is simply counting formats might conclude that the answer is “yes”, whereas most listeners might not perceive these as distinct formats.

As a consequence of the above, I must strongly disagree with the NAB’s contention that increased media outlets justify further broadcast ownership deregulation. While some loosening of the ownership restrictions that existed in the seventies was justified by the increased number of broadcast stations, the amount of loosening of the restrictions that has actually occurred is far in excess of what is justified by the existence of the new outlets. Diversity of broadcast station ownership should remain a priority in broadcast regulation as a matter of serving the public interest.

**The Public interest in diversity is not being met on a market basis**

The NAB notes that the number of media outlets available to the public in even small markets has increased dramatically since 1960, per the *FCC Media Outlet Study*. I feel compelled to point out that the starting date of this study appears to have been selected in such a way as to maximize the perceived increase in the number of media outlets available to the public.

Notably, the 1960 baseline precedes numerous FCC efforts to promote media diversity. These efforts include the All Channel Act (for television), the approval of FM stereo and prohibition of AM/FM simulcasts in major markets, as well as the effects of docket 80-90 on the number of FM stations available in many smaller communities. During this period, funding to establish a nationwide system of public broadcasting also came into place, providing many cities with their first public television and radio outlets.

The typical media landscape of 1960 included three television stations, each affiliated with one of the broadcast networks, plus a handful of AM stations. FM was largely relegated to simulcasts of co-owned AM stations or easy listening music programmed as background for shopkeepers. UHF television was non-competitive and was only a factor in a handful of small television markets that had either one or no VHF stations. Public (or educational) television was similarly available in a handful of communities due to the lack of funding and VHF channels in most major communities. Using this era as the baseline for "media diversity" sets a very low standard indeed – and one that we should certainly hope to exceed.

If, instead, the standard for comparison were selected from the early to mid eighties, a very different media landscape would be observed. By the mid-eighties, UHF had brought at least one independent commercial television station to most of the top 100 markets, and to quite a few markets below the top 100. Public television had also expanded dramatically, with outlets in every state except two (Montana and Wyoming). FM radio had become competitive, doubling the radio choices available to most every listener in all but the furthest rural locations. All of this without any change in the broadcast ownership rules – the 7/7/7 limits that applied in 1960 still applied in the early eighties, and when they were updated it was only to increase these numerical limits slightly.

As an example, consider the television choices available to viewers in a typical medium sized television market – I'll use Spokane, WA as my example since it is an area I am personally familiar with (having lived near Spokane for several years). In 1960, the viewing public's choice consisted of three network affiliates, as was typical for the time. In 1967, viewers gained a fourth choice when KSPS(TV) came on the air to provide public/educational television service to the area. In 1982, independent commercial television came to the area in the form of KAYU(TV), followed a year later by a second independent station (KSKN). From three choices to six is a significant change – and one that occurred without the necessity of any ownership deregulation at all.

Further ownership deregulation stands to reduce the number of choices available to viewers in Spokane below that which was available at the end of 1983 – and to reduce the choices in every other market, as well.

**“Efficiency” shouldn’t be a goal of broadcast regulation**

Much has been made of “[c]ombinational efficiencies derived from common ownership” by the FCC, the NAB, and various others. Broadcast policy would be improved if this were made a lower priority.

While it is desirable that the broadcast industries as a whole be financially viable in order that broadcasters may continue to provide service to the public, this does not mean that it is be a regulatory goal to maximize the profitability of individual stations. Simply put, it is the nature of any business that some operations will be unsuccessful – and will either be bought out by someone else or will simply go out of business. There is no reason why radio and television should be exempt from the risks that apply to every other business.

There is, however, a reason to not allow unsuccessful broadcasters to be bought out in large numbers by their more successful counterparts – and that reason is the limited number of stations that the broadcast spectrum can accommodate. If a small businessperson is interested in competing with McDonalds, he can choose to buy a restaurant across the street that already exists – or he can build a new one up the street on undeveloped land. Unfortunately, if a small business person wishes to compete with Clear Channel, his options are more limited -- since the chances are that no open frequency can be found, he is limited to trying to buy an existing station in a given market. If all the reasonably competitive signals in a given market are owned by Clear Channel, Infinity, Entercom and other big companies, it is likely that none will be for sale at any price and the potential new competitor is frozen out. In few other businesses outside of broadcasting does the ownership of existing outlets so thoroughly preclude new competition.

Since new competition helps keep existing businesses on their toes, a certain amount of ownership turnover and new blood is ultimately good for an entire industry. Unfortunately, a credible argument can be made that ownership deregulation to the extent that it currently exists has largely "frozen the deck" in the broadcast industries. The consequence is that new entrants have been kept out who might otherwise bring new ideas and ways of doing things to the benefit of the entire industry – and the public. This is another reason why promoting diversity of ownership remains a matter of the public interest.

In short, diversity of ownership should be a primary regulatory goal, and the "efficiency" of broadcast stations at generating profits should be a secondary consideration to this primary goal.

**Cross-ownership rules and same-outlet limits should be modified, but not eliminated**

The NAB advocates the repeal of the existing cross-ownership rules; with the exception of the newspaper-broadcast rules, I must respectfully disagree.

I do support repeal of the newspaper-broadcast cross-ownership prohibition for the simple reason that it has never been consistently enforced. By grandfathering existing combinations in 1975, the FCC ensured that the most powerful combinations remained in place. Enforcing these rules against some players, but not against others seems inherently unfair. Since the FCC is unlikely to break up the remaining newspaper-broadcast combinations, the appropriate action is to level the playing field by eliminating this rule.

Television-radio cross-ownership is a more complex issue, due to the lessening of other ownership restrictions over the years. The old prohibition on such combinations resulted in an unfair playing field since existing combinations were grandfathered in. This resulted in a situation back in the 1980s wherein a new independent UHF television station could be precluded from common ownership of a same-market radio station, even though the established VHF network affiliates were all part of grandfathered radio-television combinations.

That said, it needs to be remembered that the broadcast spectrum remains a limited commodity, and allowing too much common ownership of broadcast stations does limit the opportunity for new entrants to come into either the television or radio marketplace. As a result, I believe that the FCC should keep the current rules that count both radio and television stations against the maximum number of broadcast stations an entity may own in a given market. In fact, with the greater reach of most television stations, a television station should be counted as the equivalent of *two* radio stations. For example, a company in a large market might be permitted to own eight radio stations, or six radio and one television stations, or four radio and two television stations.

Finally, the NAB proposes a substantial modification to the television duopoly rules, replacing the "voice" test with what they refer to as the "10/10" rule, wherein two television stations could not be commonly owned unless at least one of the stations has less than a ten percent audience share. This rule has the advantage of providing a simple test to determine whether duopolies will be allowed in a particular market – and warrants consideration if the guideline is modified to specify that one of the stations must have less than a ten percent share of the *audience viewing local stations*. This would ensure that the local television marketplace could not be dominated by one or two companies when substantial viewing occurs to out of market or non-broadcast outlets – but would still provide increased ownership flexibility for small market television broadcasters.

**The commission does have the authority to override 202(b)(1) of the 1996 Act**

The NAB errs in arguing that the FCC lacks this authority. When the legislation in question was written, common ownership of radio and television stations in the same market was still prohibited by FCC rules (except for certain existing grandfathered combinations); therefore, the effect of such common ownership was not considered by the Congress. As a consequence, allowing the common ownership of the maximum number of radio stations allowed per the legislation *plus* two additional television stations might very well violate the intent of the legislation when it comes to concentration of control of local broadcast media. It is incumbent upon the FCC to consider the effects of allowing these combinations accordingly, and to adjust the limits to reflect both radio and television station ownership.

**National ownership limits**

The NAB rightly supports retention of the statutory limit included in the 1996 Telecommunications Act that no entity may own television stations that cover more than 35% of the population. I agree with the NAB that this rule should be retained.

However, the FCC needs to reconsider two aspects of the way that this limit is currently enforced.

The first issue is with the handling of television duopolies, which did not exist when the legislation was written. As the FCC currently interprets this rule, the second station in a same market duopoly is not counted toward the 35% limit; this should be changed. The appropriate way to calculate the 35% limit is to add together the population covered by *each* station owned by an entity, regardless of whether these stations are in the same or different markets. This would close the loophole that has allowed several companies to own substantially more television stations than was the intent of the legislation.

The second issue that needs to be considered is the 50% discount for UHF television stations. In effect, this allows a "UHF only" group to cover 70% of the US despite the fact that the VHF-UHF coverage gap is largely a thing of the past. As evidence of this, there are now several markets where UHF stations routinely outrate their VHF counterparts in various dayparts; Seattle-Tacoma (where KTWB channel 22 outrates KSTW channel 11 in primetime) and Jacksonville (where WTEV channel 47 outrates WTLV channel 12 and WJXT channel 3 in both midday and primetime) serve as two examples. Accordingly, the “UHF discount” should be eliminated, and the full coverage of UHF television stations should be applied to calculating the 35% national limit.

**Conclusions**

Some modifications of the current ownership rules are justified, tightening the rules in certain respects and loosening them in others.

Specifically, the FCC should repeal the newspaper-broadcasting cross-ownership rules completely, which have long outlived any purpose. The television duopoly rules should also be loosened slightly by applying a consistent guideline based on share of the local television broadcast audience regardless of market size in place of the market “voices” test currently used..

However, the FCC should continue counting television stations against the radio ownership limits specified in the 1996 Telecommunications Act, and in fact should count each television station as being equal to two radio stations for the purpose of these limits. This is reasonable to reflect the higher profile and greater impact of television in the marketplace. The FCC should also count television duopolies differently than it currently does when calculating the 35% national ownership cap for television stations, and should eliminate the “UHF discount”.

These changes would grant broadcasters some additional ownership flexibility while ensuring that ownership diversity remains a strong priority in broadcast regulation.

Respectfully submitted,

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